

SOUTH AFRICA / JUDGMENT

**South African Local Authorities Pension Fund v  
Lukhanji Municipality, South African Local Authorities  
Pension Fund v Tsolwana Municipality (1453/2008,  
1459/2008) [2011] ZAECGHC 54 (18 October 2011)  
[2011] ZAECGHC 54**

## COURT

Eastern Cape High Court, Grahamstown

## BEFORE

J W Eksteen

## CASE / FILE NUMBER

1453/2008, 1459/2008

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IN

THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE  
EASTERN

CAPE, GRAHAMSTOWN

Date Heard: 14 &amp; 15 September

2011

Date Delivered: 18 October 2011

In

the matters between:

Case No.: 1453/2008

SOUTH

AFRICAN LOCAL AUTHORITIES PENSION FUND .....Plaintiff

and

LUKHANJI

MUNICIPALITY

.....Defendant

AND

Case No.: 1459/2008

SOUTH

AFRICAN LOCAL AUTHORITIES PENSION FUND .....Plaintiff

TSOLWANA

MUNICIPALITY

.....Defendant

## JUDGMENT

EKSTEEN J:

- [1] The plaintiff, a pension fund, issued summons against the defendant in each case and it claimed a sum of money which it contends is due and owing in respect of employers' contributions due to it by the defendants as participating employers in the fund. By agreement the matters were consolidated and proceeded simultaneously. It is common cause that the defendants, as participating employers, are bound by the rules of the plaintiff as amended from time to time. On 20 August 2003 the trustees of the plaintiff took a resolution to amend the rules of the plaintiff with effect from 1 July 2003. The amendment in issue provides for an increased contribution by the participating employers to the plaintiff. By virtue of the Pension Fund Act, 24 of 1956 (hereinafter called "PFA") and the rules of the plaintiff, the amendment can only be enforceable once it has been approved by the Registrar of Pensions (hereinafter called "the registrar"). This only occurred on 5 July 2006. The defendants accept the liability to pay the increased contribution from the date of the registration of the amendment to the rule, however, they contend it is not competent for the plaintiff to implement the amendment with retrospective effect from 1 July 2003. They have accordingly declined to pay the increased contribution for the period 1 July 2003 to 5 July 2006.
- [2] At the commencement of the trial I was advised that the parties were in agreement that the quantification of the plaintiff's claim should be separated from the further issues in the trial and should stand over for adjudication in due course, if necessary. I made an order to that effect. The present proceedings therefore concern only the merits of the plaintiff's claim.

In limine

- [3] The plaintiff has alleged in each case that it had given due and proper notice to the defendant of these proceedings as required by the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002. This the defendant denied in each case. At the commencement of the proceedings Mr Paterson acting on behalf of the defendants, indicated that the defendants' attitude was that notice was not required and that he would place no reliance on the provisions of this legislation. This issue raised in the pleadings does accordingly not require resolution.

The legal context

- [4] The plaintiff is a "defined benefit fund". Section 16 of the PFA requires of the plaintiff to cause its financial condition to be investigated and reported on at least once every three years by its valuator, appointed in terms of section 9A of the PFA. If such a report indicates, in the opinion of the registrar, that the plaintiff is not in a sound financial condition, the registrar must, in terms of section 18 of the PFA direct the plaintiff to submit to him a scheme setting out the arrangements which have been made or which are intended to be

made so as to bring the plaintiff into a financially sound condition within a reasonable time. In the event that the registrar approves this scheme in terms of section 18(2) of the PFA, then, in terms of section 18(4) of the PFA the plaintiff is obliged to implement the scheme, subject thereto that the registrar may withdraw his approval and require the plaintiff to submit a new scheme if any return deposited during the currency of the scheme indicates, in his opinion, that the scheme is unlikely to achieve its objective. The registrar may also permit the plaintiff to amend its scheme from time to time in certain circumstances as set out in section 18(4)(a) of the PFA.

- [5] The plaintiff is “a financial institution” as defined in the Financial Services Board Act, 97 of 1990 (hereinafter called “FSBA”) and is accordingly subject to the supervision of the Financial Services Board (hereinafter called “FSB”) in terms of section 3 of the FSBA. The Registrar of Pension Funds as defined in the PFA is the executive officer of the FSB.
- [6] It is common cause that the plaintiff is governed by the PFA and by its own rules. In respect of the amendment of rules section 12(1) of the PFA provides that a registered fund may, in the manner directed by its rules, alter or rescind any rule or make any additional rule, but no such alteration, rescission or addition shall be valid-

*“(a) if it purports to effect any right of a creditor of the fund, other than a member or shareholder thereof; or*

- (b) unless it has been approved by the registrar and registered as provided in subsection (4).”

- [7] Subsection (4) provides as follows:

*“(4) [i]f the registrar finds that any such alteration, rescission or addition is not inconsistent with this Act, and is satisfied that it is financially sound, he shall register the alteration, rescission or addition and return a copy of the resolution to the principal officer with the date of registration endorsed thereon, and such alteration, rescission or addition, as the case may be, shall take effect as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.”*

- [8] Rule 2.3.1 of the rules of the plaintiff regulates an amendment to the rules. It provides as follows:

*“The TRUSTEES may by resolution amend these Rules, (which shall include, if necessary and after consultation with a VALUATOR, reducing*

benefits in respect of future service or increasing MEMBERS’ contributions).

No amendment to the Rules of the Fund may be made unless the amendment has been approved by the Registrar of Pension Funds.”

The factual history

- [9] The facts pertaining to this matter are largely common cause. Old Mutual Employer Benefits, a Division of Old Mutual Life Assurance Company (South Africa) Limited was the appointed Fund administrators. The duly appointed valuator changed from time to time.
- [10] The tri-annual investigations of the financial conditions of the plaintiff were carried out as required by section 16 of the PFA. In the report of the financial year ending on 30 June 1998, which was deposited in June 1999, Old Mutual Employee Benefits, at the instance of the valuator, reported as follows:

*“The financial situation of the fund has deteriorated significantly to a position where it was only 81% funded at the valuation as at 30th June 1998.*

Since this deterioration has essentially come about because of experience deviations over this period with regard to salary increases, and to some extent an increased ill-health early retiral strain and a shortfall on investment earnings, this would, in the normal course of events, be required to be funded over a period of three years from 1.7.1998. This is in terms of PF Circular 66 issued by the Registrar of Pension Funds. This would then require an additional employer contribution rate of 13,84% of salary bill to be paid over the next three years.

This is clearly an untenable situation for the Local Authority employers, in view of the severe financial constraints that they currently face, and therefore does not appear to be a realistic solution to the problem.

However the Registrar, in terms of Section 18 of the Pension Fund Act is obliged to direct the fund to submit a scheme which is intended to bring the fund into a financially sound position within a reasonable period. This scheme has to be devised within three months of the direction.

As has been referred to previously, the circumstances giving rise to the deficit have been totally beyond the trustee powers to control, and relate to the transformations that have needed to take place within Local Government following on the

## introduction

of the new constitution and the introduction of the post apartheid legislation. It would seem to me that solutions to these problems will need to be found at a political level by the trustees and I believe it is only fair that Government should participate in them.

There are also, nevertheless, interventions that the trustees can and will need to take within the fund itself ...

I recommend that the trustees consider all these relevant issues and determine a scheme of arrangement which can be submitted to the Registrar of Pension Funds. To this end I shall submit a further report to the trustees outlining in more detail how some of these matters may be dealt with.”

- [11] The evidence does not contain this further report, however, it clearly emerges that a scheme of arrangement as envisaged in section 18 of the PFA was approved by the registrar in terms of which the pension benefits were reduced and the plaintiff would be required to eliminate the deficit over a period of ten years. It was further required of the pension fund to carry out a valuation annually. This is recorded in the valuation report for the year ending 30 June 1999. In summarising the findings of the 1999 valuation Old Mutual Employee benefits reported as follows:

*“The financial situation of the fund has improved slightly to a position where it was 82% funded at the valuation as of 1 July 1999. This position should improve to about 94% as at the next valuation once allowance is made for the change in final salary definition, and once the shares are sold and invested in the Guaranteed Fund.”*

- [12] A further valuation was carried out as at 1 July 2000. In this report the valuator reported as follows:

*“The financial situation of the fund has improved slightly to a position where it is 88% funded at the valuation as at 1 July 2000. This is however less than what the trustees had expected (some 92%) after the benefit changes and sale of the Old Mutual shares.”*

- [13] In September 2001 the valuator, at that time one Llewellyn de Jager, addressed a report to the chief actuary of the FSB in respect of the plaintiff. He records therein, inter alia, that there is a significant likelihood that the trustees would have to consider major restructuring of the fund once the tri-annual valuation has been completed. This he recorded was strongly influenced by:

*“• The employers not wanting to contribute any additional monies to the Local Government Retirement Funds. It appears as though a fixed*

contribution rate is being negotiated with labour on a national basis

- Pressure on the cost of the current risk benefits – largely as a result of AIDS and the cost of cover.”

- [14] He concluded for those reasons that it was inappropriate at that time to take further action.

- [15] The next tri-annual report, which was referred to in the letter to the FSB was compiled in respect of the position as of 1 July 2001. Whilst this report does not carry a date of submission it would appear, in accordance with the previous reports, that it would have been submitted at approximately June 2002. In this report the valuator reports that significant upward pressure is being placed on the required contribution rate for risk benefits. The main reasons for this, he said, are the increase in the salary weighted average age of members of the Fund together with the worsening claims experience. He records that the Fund has already adjusted the mortality assumptions used in the valuation basis to incorporate the higher mortality experience at younger ages.

[16] This then reflects the difficulties which the plaintiff experienced from 1998 to 2001. Pursuant thereto the valuator addressed a further report to the FSB to which he annexed a summary of the full report which he had provided. He concludes therein that the trustees now need to draw up a revised scheme of arrangement given the current results, especially given the fact that the current employer future service contributions are insufficient to fund the current future service benefits. He accordingly, in consultation with the trustees, compiled a proposed new scheme of arrangement which was submitted to the registrar on 19 October 2002. An integral part of the new scheme of arrangement was an approach to the employers. The proposal provided for the trustees to ask the employers to fund the deficit which had emerged by way of increased contributions to the Fund. The submission accordingly concluded as follows:

*“The trustees are seeking the approval of this Scheme of Arrangement from the FSB before they enter into discussions with the current members of the fund as well as the employers. The intended process that they intend following can be summarised as follows:*

Obtain conceptual improvement from the FSB.

Engage with the employers in order to agree an increase in contributions with effect from 1 July 2003 (process to begin in March 2003).

Present the rationale for change as well as the new benefit design at all the SALA Pension Fund regional board meetings (these will take place during March 2003).

Send members information which explains the benefit changes. Suggest members provide feedback to their regional representatives should they have any concerns.

Consolidate feedback from the Regional Board meetings and members in order to ensure that all changes can be implemented.

Implement the benefit changes with effect from 1 July 2003.”

[17] The new scheme of arrangement was deposited with the FSB and on 21 May 2003 the registrar gave his approval in principle to the scheme.

[18] On 9 April 2003 the principal officer of the plaintiff, Mr Makatikela, caused a letter to be dispatched to each Municipal Manager in the country which sets out the intended scheme. I pause to mention that Mr Bacela, the Municipal Manager of Lukhanji Municipality testified that he does not recall that he received this letter. Mr Dayi, the Municipal Manager for Tsolwana Municipality, denies that he received it. I do not think that much turns on this point. The letter does however specify that the changes will be implemented from 1 July 2003.

[19] In the interim the trustees had begun their engagement with members and participating employers. It is necessary at this stage to pause to consider briefly the structure of the plaintiff as it emerged from the evidence in order to appreciate the nature of the engagement. The plaintiff is governed by a “Board” as envisaged in section 7A of the PFA. In

the case of the plaintiff it was established in terms of the trust deed and “the Board” is constituted by the trustees. In terms of the rules, the trustees are elected at stipulated intervals as set out in rule 2. The board of trustees is comprised of an equal number of employer representatives and employee representatives. One employer representative is elected by the employer representatives of

each regional committee and one employee representative is elected by the employee representatives of each regional committee. The regional committees are not specifically dealt with in the rules, however, the evidence establishes that the plaintiff has a regional committee in each province. These committees, like the board of trustees, is comprised of an equal number of representatives elected by the employers and elected by the employees.

[20] The engagement with the employers and the employees embarked upon by the plaintiff occurred in these regional committees. Each regional committee approved the scheme, and notably the regional committee in the Eastern Cape Province, in which both the defendants are situated, adopted a resolution on 11 March 2003 to adopt the new scheme of arrangement in respect of the increase in employer contribution the resolution records as follows:

*“The committee was informed of the proposed scheme of arrangements as supplied by the Actuary whereby the following changes to the rules of the Fund were explained:*

1. Increase of employer contribution by 2,5% of pensionable salary (including bonus) – The total increase = 2,71% of basic annual salary.
2. ...”

[21] The resolution accordingly makes it clear that the scheme of arrangement would be implemented by means of a “change to the rules of the fund”. While the resolution did not record that the change would be implemented with effect from 1 July 2003, the date as set out above, was specifically recorded in the recommended scheme which was adopted by the resolution.

[22] While the engagement was still ongoing the South African Local Government Association (hereinafter called “SALGA”) got wind of the intended change. SALGA is an organisation to which both the defendants are affiliated and which, as its name suggests, represents the interest of local authorities. On 5 August 2003 SALGA addressed a letter to its members recommending that they should reject the proposed increase. At the same time SALGA requested a meeting with the plaintiff. A meeting was duly held whereafter Mr Makatikela recorded in writing the reasons for the increased contribution by letter erroneously dated 4 August

2003. I say that it is erroneously dated as the first paragraph refers to the letter of SALGA dated 5 August 2003 and the subsequent meeting. Be that as it may, an agreement was then reached with SALGA. It is not clear when this agreement was reached, however, in January 2005 the plaintiff sent out a demand to all municipalities who had failed to pay the increased contribution. In the letter, which was signed by Mr Makatikela, the plaintiff records:

*“In many instances they [Municipalities] have referred to a draft letter issued by SALGA indicating that they intend restructuring the retirement benefit arrangements that exist for all local authority employees wherein the employer contributions are capped at 18%.*

The Trustees of the SALA Pension Fund have consulted with SALGA, and reached an agreement with them that employers should not use this intention, which has still not been implemented, as the reason for non-payment of the required contribution as agreed in terms of the above Scheme of Arrangement.”

[23] On 4 February 2005 SALGA wrote to the Municipal Managers of all its members in respect of the agreement. It reads as follows:

*“Dear Colleagues*

I would like to bring to your attention that there was a meeting between SALGA and the Board of Trustees of SALA Pension and the issue that was discussed there was pension fund restructuring and the proposed increased on employer contribution.

I would therefore bring to your attention that an agreement was reached that according to the pension fund act and the rules of the pension fund an employer is obliged to increase his contribution towards the pension fund if the pension fund has legitimate reasons for that increase, therefore the parties agreed that those municipalities who are contributing to SALA Pension Fund should increase their contributions according to the request of the pension fund. This will be retrospectively from 01.07.2003. One other thing is that Municipalities can make arrangements to pay the arrears with that fund.”

[24] Reverting to SALGA’s letter of 5 August 2003 to its members, both Mr Bacela and Mr Dayi testified that they received this letter. Both say that their municipalities, the defendants herein, took a resolution in accordance with the recommendation of SALGA to reject a scheme. I do not think that either of these witnesses was very persuasive in this regard. Neither defendant had discovered such a resolution nor was one tendered in evidence. Neither was able to give any reasonable explanation for its failure nor to provide any further particularity relating to the resolution. This is in any event not an issue which I consider to be decisive for the reasons which are set out below.

[25] It is common cause that pursuant to the foregoing the trustees of the plaintiff took a resolution on 20 August 2003 to amend a number of its rules, including the rule relating to the increase in the employer contributions with effect from 1 July 2003. I pause to mention that the first transcript of the resolution signed on 10 October 2003 reflects that the

employers would be required to contribute 20,57% of the members annual salary and bonus. This was clearly an error and does not accord with the scheme submitted to the FSB nor with the resolution taken by the regional committees. It was later corrected to reflect the figure of 20,78% and resubmitted. The resolution of 20 August 2003, which was a composite resolution which sought to amend a number of different rules was forwarded to the FSB for registration by the registrar on 24 October 2003 in accordance with section 12(2) of the PFA. Various discussions with the FSB followed which caused a delay of approximately three years before the registrar ultimately approved the amendment of the rule with effect from 1 July 2003.

- [26] Against this background the plaintiff now claims payment of the increased contributions from 1 July 2003. The validity of the resolution amending the rule is not in issue and the defendants accept that they are bound by the rule amendment, however, they contend that it can only be effective from the date of the registration of the rule. The present dispute therefore relates only to the retrospective effect of the rule and the contributions which the plaintiff contends it is entitled to in respect of the period July 2003 to the date of registration of the amendment.
- [27] The defence raised in the pleadings by each of the defendants is identical. It proceeds on three legs, firstly, an interpretation of the rules of the plaintiff, secondly, an interpretation of section 12(4) of the PFA and finally an argument based on the Local Government: Municipal Finance Management Act, 56 of 2003 (hereinafter called “MFMA”). This latter defence is formulated in the pleadings as follows:

*“Defendant further pleads that section 15 of the Local Government: Municipal Finance Management Act 56 of 2003 provides that a municipality may only incur expenditure in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget. Sections 17(1)(b) and 17(3)(k) and (l) of the same Act provide how amounts relevant to those claimed by Plaintiff are to be appropriated for each budget year under the different votes of the municipality. The result of the two provisions, read together, is that a municipality is not empowered to incur retrospective debts. The statutory position concerning the powers of the municipality limits the powers of the trustees of Plaintiff and also prohibits Defendant from making any payments prior to the approval by the Registrar of the rule amendment.”*

#### Section 12(4) of the PFA and the Rules

- [28] Section 12(4) of the PFA provides for the registration of an amendment to the rules. It continues to provide that such an amendment shall take effect “as from the date determined by the fund concerned or, if no date has been so determined, as from the said date of registration.” The plaintiff contends that it has determined a date, being 1 July 2003.
- [29] The defence raised in the pleadings in each case in respect of section 12(4) is formulated as follows:

*“3.4 Defendant further pleads that section 12(4) of the Pension Fund Act 24 of 1956 does not provide for the retrospective operation of an amendment of the rules of a fund to any date prior to the date of approval.”*

- [30] The argument is predominantly linguistic and largely reliant on section 13A(3)(a)(i) which requires contributions to a fund to be transmitted “not later than seven days after the end of the month for which such a contribution is payable”. This, it is argued, is indicative that the amendment in respect of such contributions cannot be retrospective.
- [31] I do not think that it is so simple. Section 13A(4) provides that “[a]n amendment of the rules of a fund relating to a reduction of contributions or the suspension or discontinuation of the payment of contributions shall not affect any liability to pay any contribution which became payable at any time before the date of the resolution whereby the amendment was effected, irrespective of the date on which the amendment may take effect”. At face value it appears to me that this subsection may be indicative thereof that any other amendment may be effective from a date prior to the resolution whereby the amendment is effected.
- [32] In *Shell and BP South African Petroleum Refineries (Pty) Limited v Murphy NO and Others* 2001 (3) SA 683 (D) Levinsohn J held in terms that section 12(4) of the Act permitted an amendment to take place with retrospective effect. I think that this is correct. This does not, of course, mean that the Board of Trustees would be entitled to set a date prior to the resolution or the registration of the rule in respect of every kind of amendment. In *South African Local Authorities Pension Fund v Elundini Municipality*, a judgment of this court delivered by Dambuzza J on 10 December 2009 (case no. 1457/2008) on exception Dambuzza J held as follows at para [17]:

*“It may be that section 12(4) of the PFA does entitle the fund to determine a date prior to registration of a rule amendment as the effective date of such amendment but an interested party is, in my view, entitled to raise absence of notice of such determination as a valid defence against a claim arising from the determination. Such failure to give notice may, on its own constitute a valid defence or the defence may be valid in the light of retrospective application of the resolution of the trustees. Further, retrospective application of the resolution of trustees may, on its own, constitute a valid defence where, for example, it is unreasonable and/or results in absurdity. It seems to me that much depends on the circumstances of each case.”*

I am in agreement with this conclusion too.

- [33] The absence of notice is not a defence raised in the present instance. To the extent that is relevant to this matter I shall revert to this issue below. The defence raised in the present instance is that section 12(4) of the PFA does not provide for the retrospective operation of an amendment of the rules of a fund to any date prior to the approval of the amendment. I have recorded above my agreement with the conclusions arrived at by Levinsohn J and Dambuzza J respectively in the cases cited above. I do not therefore think that this defence can succeed as an absolute defence. It must depend on the circumstances of the case.

- [34] Do the circumstances of this case then inhibit retrospective operation? The circumstances leading up to the amendment in this case are recorded above. It is apparent from the history that the plaintiff had been underfunded since 1998. Ordinarily the registrar requires such a Fund to return to financial soundness within three years. In this case, however, he granted an indulgence, apparently because it was “an untenable situation for the Local Authority employers” and he permitted a scheme of arrangement which would bring the Fund on a sound footing in ten years. This scheme did not have the desired effect and a new scheme was proposed in October 2002. The new scheme required an increase in employer contributions with effect from 1 July 2003.
- [35] The valuator appreciated from the outset that this would require a negotiated agreement with employers. The plaintiff, however, has a vast number of participating employers in the form of local authorities across the entire country. I do not think that an agreement is required with each individual employer. The plaintiff has an established structure in its regional committees in each province where employers and employees are represented by their elected representatives. The proposed new scheme was accordingly debated in each regional committee and was approved by each such committee. In addition both the defendants are affiliated with SALGA, which represents the interests of its members. At the instance of SALGA, the plaintiff entered into negotiations with SALGA too. This too resulted in an agreement that the scheme, and accordingly the rule amendment, be approved with effect from 1 July 2003.
- [36] In the circumstances it cannot be said that this amendment constitutes a “unilateral imposition of an obligation”. It is a negotiated variation of the rule. That being so I do not think that it can be said to be unreasonable or absurd. In *Registrar of Pension Funds v ICS Pension Fund* [2010] 4 All SA 63 (SCA) the Supreme Court of Appeal was called upon to consider section 15F of the PFA. This section provides for the transfer of a credit balance in an existing reserve account. Section 15F(2) authorises the registrar to approve such a transfer if he “is satisfied that the allocation of actuarial surplus to such account was negotiated between stakeholders ...”. In this context Lewis JA and Theron AJA, commenting on the findings of the Board of Appeal provided for in the PFA, stated at para [26] p. 70:

‘We find no fault with those general observations, which were adopted by the court below, but with some qualification. So far as the final passage might suggest that it was incumbent upon the board of a fund always to have engaged in discussions with participants in the allocation directly, we do not think that is correct. Precisely how the board of a fund was to “negotiate” with a large body of participants, if they were not in agreement with the proposal that was made by the fund, was not touched upon in that case, nor does it arise in this case. But we venture to suggest that it would ordinarily be impractical to expect the board of a fund to have dealt directly with a large body of interested parties, who might have had disparate interests, and that a board might instead have been justified in insisting that the participants elect representatives to negotiate on their behalf.’

- [37] They went on in paragraph [28] on p. 71 to note that what would be required in any given case would depend upon the circumstances of the case.
- [38] I am alive to the fact that these comments were made in the context of the negotiation required by section 15F of the PFA, however, I think that, by parity of reasoning, they may find equal application to the engagement which the FSB required of the plaintiff in giving its approval to the new scheme of arrangement, and ultimately to the amendment to the rule. It cannot then assist the defendants to say that they, as individual employers, did not receive the letter of 9 April 2003 nor that they did not know of the resolution of the regional committee of the Eastern Cape.
- [39] In all the circumstances I can find nothing in section 12(4), read in its context, which prevents the plaintiff from amending its rule, in the manner which it did, with effect from 1 July 2003.
- [40] I turn to consider the interpretation of the rule. The defendants, in their plea, contend as follows:
- “3.2 Defendant pleads that rule 2.3.1 provides that: ‘[n]o amendment to the Rules of the Fund may be made unless the amendment has been approved by the Registrar of Pension Funds.’*
- 3.3 The Defendant denies that such resolution may provide for the amendment to be of effect on any date prior to the approval by the Registrar of Pension Funds.”
- [41] Rule 2.3.1 provides for the amendment of the rules by resolution taken by the trustees. The proviso to the rule is correctly set out in the pleading which is quoted above.
- [42] The validity of the resolution to vary the contribution is, as previously recorded, not disputed. What is in dispute is whether the plaintiff may claim the amount calculated in accordance with the amended rule from 1 July 2003 to the date of registration of the rule. The plaintiff accepts that it could not have enforced the rule against any employer prior to the approval and registration of the rule by the registrar. It contends however that it has by resolution determined the date from which the increased liability of the employers would be calculated when ultimately the registrar approved the amendment and registered it. It claims that section 12(4) provides for it to do so.
- [43] It is well established that the relationship between the plaintiff and the defendants is contractual in nature. It is common cause between the parties that the rules of the plaintiff bind the defendants in terms of their contractual relationship.
- [44] The defendants’ argument is purely linguistic. It argues that in terms of rule 2.3 an amendment may not be effected without the prior approval of the registrar. Rule 4.2.2, the rule to which the amendment relates, refers to the employer’s “current contribution for each month”. Rule 4.4 provides that an employer’s contribution must be paid over to the plaintiff “within a period of 15 (fifteen) days from the end of the calendar month to which such contributions relate”. Rule 4.5.2 authorises the plaintiff to require “an increase in the future

rate of EMPLOYERS and/or MEMBERS contributions”. On this basis it is submitted that the rule provides only for contributions which are current and do not permit the retrospective amendment upon which reliance is placed.

- [45] In *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010* (2) SA 498 (SCA) Lewis JA considered the interpretation of the rules of a Pension Fund. She stated at 501 para [13]:

*“[13] The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which Bekker NO was decided, and, more recently, Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another was based on the same logic. The principle requires a court to construe a contract in context - within the factual matrix in which*

*the parties operated.”*

- [46] The factual matrix in which the plaintiff operated appears from the terms of the PFA. The plaintiff is bound by the provisions of, inter alia, section 16, 17 and 18 of the PFA which places obligations upon the trustees to ensure that the fund is at all times in a sound financial condition and to restore it to such a condition within a reasonable time when it is found wanting. I think that a proper interpretation of the rules must have regard to the statutory regulation of pension funds. Thus, in *Ekurhuleni Municipality supra*, when considering the purpose of the rules Lewis JA stated at 504 para [22]:

*“The rules of any fund must be based on sound financial principles and the board of a fund has the obligation to ensure that members' interests are protected (see ss 7C and 7D of the Act on the objects and duties of pension fund boards). An administrator of a fund must maintain adequate financial resources to meet its commitments and manage the risks to which a fund is exposed (s 13B(5)(f)).”*

- [47] Viewed in this light I think the rules must be interpreted in a manner which is consonant with the obligations of the trustees under the PFA. I think therefore that the rules do empower the trustees to amend the rule as they did, with effect 1 July 2003, so as to give effect to their obligation to implement the scheme of arrangement which had been approved by the registrar and by the employers in the regional committees.
- [48] In any event, rule 4.5.1 of the plaintiff's rules provides that the trustees may “require ... an additional contribution to be paid by the EMPLOYER at such time or times and of such amounts as decided upon between the VALUATOR and the TRUSTEES ...”.

- [49] The contentious resolution which brings about the amendment to the rules reads as follows:

*“RESOLVED THAT with effect from 1 July 2003 and subject to the approval of the Registrar of Pension Funds, the following amendment be made to the Rules of the Fund:*

1. ...
2. Rule 4.2.2 has been replaced with the following:

#### 4.2.2 RATE OF CONTRIBUTION IN RESPECT OF CURRENT SERVICE: ...”

[50] The effect thereof is no more than that the employers are now required to pay to the plaintiff the difference between the amount which employers would have paid over the period 1 July 2003 to the date of registration of the amendment had the rule been amended and registered on 1 July 2003, and the amount which they have in fact paid in respect of that period as calculated on the rule as it was formulated prior to the amendment. That amount could only become payable once the rule was registered, with effect from 1 July 2003. In this regard I am advised from the Bar by Mr Arendse who appears on behalf of the plaintiff that whereas the Particulars of Claim seek interest *a tempore morae* the plaintiff does not contend for any *mora* interest prior to the registration of the rule amendment. In these circumstances the relevance of the effective date, being 1 July 2003, is merely to determine the amount which became payable and which the trustees were entitled to claim in accordance with rule 4.5.1 upon the date of the registration of the rule amendment. I do not think that the rules of the fund preclude the amendment of rule 4.2.2 “with effect from 1 July 2003”.

#### The MFMA

- [51] Finally, the defendants have raised the provisions of the MFMA. Before I consider this argument it is necessary to refer briefly to the history relating the matter as set out above. The plaintiff gave notice to all Municipal Managers of the intended increase which would be effective from 1 July 2003 on 9 April 2003.
- [52] On 11 March 2003 a resolution was taken in the regional committee of the plaintiff in the Eastern Cape to adopt the increased contribution. While both Mr Bacela and Mr Dayi concede that the employers are represented in this committee both deny knowledge of the meeting and of the resolution. In cross-examination both attribute this to the poor communication between themselves and their representatives in the committee.
- [53] On any version, however, by early August 2003, when SALGA addressed a letter to its members, both defendants had knowledge of the intended increase in employer contributions. SALGA thereafter agreed with the plaintiff on the effective date and the extent of the increase.
- [54] Both defendants were accordingly aware of the plaintiff’s claim to an increased contribution from at least August 2003. Both Mr Bacela and Mr Dayi testified in respect of the budgeting process. The financial year of the defendants runs from July to June. Section 24 of the MFMA requires a budget to be approved prior to the commencement of the financial year. In practice, they testified, it occurs during approximately April or May. Section 17 sets out what must be included in the budget. Thereafter, subject to section 28 of the MFMA, expenditure can only be made in accordance with the budget as stipulated in section 15 of the MFMA. Section 28 provides for the Municipality to revise its approved budget by means of an adjustments budget during the currency of a financial year. Section 28(1)(g) empowers the Municipality to provide in such a budget for any other expenditure within a prescribed framework.

- [55] By August 2003 both defendants knew of the scheme of arrangement and the plaintiff's claim for an increased contribution. At that stage they could have revised their budget. They chose to passively resist the plaintiff's claim while fully appreciating that they may in time be required to pay.
- [56] Both Mr Bacela and Mr Dayi have testified that contingent liabilities must be provided for and must further be reflected in the annual financial statements of the local authority. Both testified that they have meticulously reflected the increased contribution claim of the plaintiff as a contingent liability from year to year. They advised the defendants each year of the disputed amount.
- [57] In these circumstances I do not think that the MFMA can have any bearing on the matter. Indeed, Mr Paterson, on behalf of the defendants, was constrained to concede that once the plaintiff's claim to an increased contribution was known, the defendants could have and ought to have budgeted to meet the claim in the event of it being held to be enforceable.
- [58] In all the circumstances I consider that the plaintiff is entitled to recover the difference between the amount that the defendants ought to have paid by reason of the retrospective operation of the rule amendment and the amount that they have in fact paid, together with interest thereon calculated at the legal rate from the date of the registration of the rule to the date of payment.
- [59] In the result I make the following order in each matter:
- 59.1 The defendant is liable to pay to the plaintiff the difference between the amount that the defendant ought to have paid by reason of the retrospective operation (from 1 July 2003) of the amendment of rule 4.2.2 and the amount which it has in fact paid in terms of the rule.
- 59.2 The defendant is liable to pay interest on the amount calculated in accordance with paragraph 59.1 above, from the date of registration of the rule amendment to the date of payment.
- 59.3 The defendant is ordered to pay the plaintiff's costs.

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J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Arendse SC instructed by N N Dullabh & Co., Grahamstown

For Defendants: Adv T Paterson SC instructed by Neville Borman &

Botha, Grahamstown

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